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No. 99-2062

In the Supreme Court of the United States

CLIFFORD ALEXANDER, ET AL., APPELLANTS

v.

NORMAN Y. MINETA, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether residents of the District of Columbia have a constitutional right to vote for Members of the House of Representatives.

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MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States and the Secretary of Commerce, respectfully moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-72a, 75a-145a) is reported at 90 F. Supp. 2d 35.

JURISDICTION

The judgment of the district court (J.S. App. 73a-74a) was entered on March 20, 2000. The notice of appeal (J.S. App. 171a-174a) was filed on May 19, 2000. The jurisdictional statement was filed on June 23, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Article I, Section 2 of the United States Constitution, which governs the election and apportionment among the States of Representatives, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, § 2, Cl. 1. Section 2 further provides that Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." *Id.* Art. I, § 2, Cl. 3; see also *id.* Amend. XIV, § 2. The Constitution identified the 13 original States by name and apportioned Representatives among them pending the first of the "actual Enumeration[s]" of the "respective Numbers" of the States to be made at least every ten years "in such Manner as [Congress] shall by Law direct." *Ibid.*

Congress has provided by statute that the Secretary of Commerce shall take the decennial census and report to the President "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141 (a) and (b). The President must, within one week of the convening of the new Congress following the decennial census, transmit to Congress "a statement showing the whole number of persons in each State * * * and the number of Representatives to which each State would be entitled under an apportionment of the then-existing number of Representa-

tives by the method known as the method of equal proportions." 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (sustaining constitutionality of equal proportions method). Each State is entitled to the number of Representatives set forth in the President's statement, and the Clerk of the House of Representatives must, within 15 days of receiving the President's statement, send the executive of each State a certificate indicating that number. 2 U.S.C. 2a(b) (1994 & Supp. IV 1998).

Article I, Section 8 of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. Art. I, § 8, Cl. 17. Since the District of Columbia became the Seat of Government of the United States nearly two hundred years ago, District residents have not been considered residents of any State for purposes of the decennial census and representation in Congress. Accordingly, the District has never been apportioned any Representatives in the House of Representatives, and provision has not been made for the citizens of the District to vote in congressional elections. See J.S. App. 44a, 89a.

2. a. On September 14, 1998, appellants—the District of Columbia and a group of District residents—commenced this suit against the Secretary of Commerce, various officers of the Senate and the House of Representatives, and the United States in the United States District Court for the District of Columbia. J.S. App. 3a-4a. Appellants contended that they have the right to voting representation in the House of Representatives and the Senate by virtue of Article I,

Sections 2 and 3 of the Constitution. *Ibid.* They further contended that the denial of congressional representation violates their rights to equal protection of the laws and due process, abridges their privileges and immunities as citizens of the United States, and denies them their right to a republican form of government as guaranteed by Article IV, Section 4 of the Constitution. *Ibid.* See also *id.* at 214a-219a.

Appellants sought a declaration that adult citizens of the District of Columbia have the right to vote for Senators and Representatives in the House of Representatives and that 2 U.S.C. 2a, 13 U.S.C. 141, and any other statutes or legislative rules denying them that right are unconstitutional. See J.S. App. 219a. Appellants also sought injunctions ordering the Secretary of Commerce and the defendant House and Senate officers to account for the citizens of the District of Columbia in performing their various responsibilities in connection with apportioning seats in the House of Representatives and in determining the identity of Representatives and Senators. See *id.* at 220a-221a.

The district court determined that the case should be heard by a three-judge district court under 28 U.S.C. 2284(a), which requires the convening of such a court in a case challenging the constitutionality of the apportionment of congressional districts. J.S. App. 170a; see *Montana*, 503 U.S. at 446.[1] The parties filed motions to dismiss and for summary judgment. Acting on those motions, the three-judge court entered judgment in favor of the defendants with respect to those claims

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[1] The district court also consolidated this case with *Adams* v. *Clinton*, part of which is currently pending in this Court (No. 00-97). We are filing a separate motion to dismiss or affirm in that case.

challenging the constitutionality of the apportionment of members of the House of Representatives. J.S. App. 73a-74a. The three-judge court remanded to the single-judge court appellants' other claims. See *id.* at 4a-6a.[2]

b. The three-judge court held that appellants present a justiciable case or controversy and have standing to pursue their claims. See J.S. App. 7a-17a. The court, however, rejected each of appellants' claims on the merits. See *id.* at 17a-72a.

The court first considered appellants' contention that the District should be treated as a "State" for purposes of Article I, Section 2. See J.S. App. 17a-39a. The court concluded that the text of the constitutional provisions governing the composition of the House of Representatives and the Senate establishes that the District is not properly treated as a "State" for purposes of Article I, Section 2. *Id.* at 21a-27a. The court further concluded that historical evidence (*id.* at 27a-34a) and a uniform body of judicial precedent (*id.* at 34a-38a) confirm that District residents have no right to vote in congressional elections.

The district court next considered appellants' contention that District residents must be allowed to vote for Representatives as "residual" citizens of Maryland. See J.S. App. 40a-58a. The court noted that it was bound by this Court's decision in *Albaugh* v. *Tawes*, 379 U.S. 27 (1964) (per curiam), which summarily affirmed a ruling that the District of Columbia is not a part of Maryland for the purpose of electing United States Senators. J.S.

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[2] The single-judge court entered judgment against appellants on the remanded claims, see J.S. App. 159a-160a, and appellants have appealed to the United States Court of Appeals for the District of Columbia Circuit. No. 00-5238 (D.C. Cir.) (held in abeyance pending disposition of this appeal).

App. 40a-42a, 56a-57a. The court also stated, however, that it would reject appellants' argument even if *Albaugh* were not an impediment because the Maryland citizenship of the District's inhabitants was extinguished upon completion of the transfer of the seat of the national government to the District. *Id.* at 42a. The court explained that residents of the area that later became the District remained citizens of their original States (and therefore continued to vote for Representatives from those States) after the legislation effecting the cession and before the effective date of the cession. They ceased, however, to be citizens of those States (and to vote for Representatives) thereafter. *Id.* at 42a-49a.

The district court also rejected the related contention that current residents of the District of Columbia are entitled to representation as the "political posterity" of the residents at the time the District was created. J.S. App. 49a-52a. The court reasoned that whether or not residents of the area that became the District possessed a right to representation that could not lawfully be revoked, any such right was personal and did not "run with the land." *Id.* at 49a-50a. Further, the court concluded, those residents had no constitutional right to vote for Representatives after the District was created because the Constitution itself provided that they did not. *Id.* at 51a-52a.

The district court further rejected the contention that residents of the District must be allowed the same right to vote that is possessed by residents of federal enclaves that are created by purchase within a State with the consent of its Legislature. Reviewing in detail this Court's decision in *Evans* v. *Cornman*, 398 U.S. 419 (1970), which held that residents of a federal enclave have a right to vote in elections conducted by

the State in which the enclave is located, the district court concluded that enclave residents have voting rights as citizens of the States in which the enclaves are located because Congress has allowed state governance in the federal enclaves. The court explained that Congress has not provided for such state governance with respect to the District and therefore the reasoning of *Evans* does not apply to District residents, who are not citizens of a State. J.S. App. 52a-57a.

The district court then considered appellants' arguments based on provisions of the Constitution other than Article I, Section 2. See J.S. App. 58a-70a. The court first rejected appellants' equal protection claim. The court explained that, as described above, the distinctions between residents of the District of Columbia and residents of the States are required by the Constitution itself. *Id.* at 58a-62a. Similarly, the Constitution affords residents of federal enclaves a right to vote that it denies to District residents who, unlike enclave residents, have not been subjected to state governance. *Id.* at 62a-63a.

Turning to appellants' claim under the Privileges and Immunities Clause of the Fourteenth Amendment, the district court concluded that the privileges of national citizenship guaranteed by the Fourteenth Amendment do not include a right to vote for Representatives that has been withheld from residents of the District of Columbia by Article I, Section 2. See J.S. App. 64a-68a. Similarly, because Article I does not grant District residents a right to vote for Representatives, the court concluded that the failure to permit such voting does not violate either the procedural or the substantive component of the Due Process Clause. *Id.* at 68a.

The district court further determined that the inability of District residents to vote for Representatives

does not violate the Guarantee Clause of Article IV, Section 4. The court questioned whether that claim presents a political question improper for judicial resolution, but concluded that the claim fails, in any event, because the Constitution specifically provides that Congress shall govern the District of Columbia and does not provide for election of Representatives by District residents. J.S. App. 69a-70a.

Judge Oberdorfer concurred in part and dissented in part. J.S. App. 75a-145a. He agreed with the court's rulings with respect to standing and jurisdiction but dissented from its holdings on the merits. *Id.* at 75a n.1, 79a-80a. Judge Oberdorfer recognized that the District is not literally a State, *id.* at 94a, but noted that from 1790 to 1800—the years after Maryland and Virginia ceded the land that would become the District, but before the Seat of Government was moved there—residents of the area continued to vote in national elections in the States that had ceded the land on which they resided. *Id.* at 86a-89a. Judge Oberdorfer would have held that the cession of the land that became the District could not terminate the voting rights of the residents of that land at the time, nor could it terminate those rights with respect to the current residents of the District, who are the "political posterity" of the 18th century residents. *Id.* at 94a-102a. Judge Oberdorfer disagreed with the majority's conclusion that the Constitution's text and historical experience require a different conclusion. *Id.* at 103a-130a. He also would have held that denying District residents the right to vote in congressional elections violates equal protection principles because, in his view, the United States has no legitimate interest in denying that right to residents of the District while granting it to residents of States,

residents of federal enclaves, and overseas voters. *Id.* at 130a-144a.

ARGUMENT

The judgment of the district court is correct and should be affirmed. The relevant constitutional text and history establish that residents of the District of Columbia have no right to representation in the House of Representatives. Moreover, "every other court to have considered the question—whether in dictum or in holding—has concluded that residents of the District do not have the right to vote for members of Congress." J.S. App. 35a. Plenary review is not warranted.[3]

1. The Constitution provides that Members of the House of Representatives shall be chosen by "the People of the several States," U.S. Const. Art. I, § 2, Cl. 1, and that Representatives "shall be apportioned among the several States which may be included within

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[3] We argued in the district court that appellants lack standing because the injury of which they complain is not judicially redressable. As a matter of original principles, we continue to believe that appellants lack standing because the courts have no authority to order the President to perform a task that is not wholly ministerial, and the President's role in the apportionment of Representatives is not wholly ministerial. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 824-828 (1992) (Scalia, J., concurring in part and concurring in the judgment). We agree with the district court, however, that this case is controlled by this Court's decision in *Franklin*, in which the Court (without issuing a majority opinion on the standing issue) held that plaintiffs who raised a similar challenge had standing. See 505 U.S. at 803 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White & Thomas, JJ.) (discussing standing); *id.* at 803-806 (opinion of the Court) (discussing the merits); *id.* at 824 n.1 (opinion of Scalia, J., concurring in part and concurring in the judgment) (concluding that a majority of the Court found standing). We therefore do not ask this Court to dismiss this appeal on standing grounds.

this Union, according to their respective Numbers," *id.* Art. I, § 2, Cl. 3; *id.* Amend. XIV, § 2. The principal question in this case is whether the District of Columbia is one of the "States" referred to in those constitutional provisions.

As the court below recognized (J.S. App. 21a, 94a), the District of Columbia is not literally a "State" for purposes of the Constitution. Justice Jackson explained:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.

National Mut. Ins. Co. v. *Tidewater Transfer Co.*, 337 U.S. 582, 588 (1949) (plurality opinion). Accord *id.* at 626 (Vinson, C.J., dissenting); *id.* at 653 (Frankfurter, J., dissenting).

Appellants contend (J.S. 14-15, 19) that the Court should "reject[] the most literal reading of a constitutional provision in favor of one that is more harmonious with the principles enunciated by the document as a whole and in keeping with its underlying purposes." J.S. 14. Departing from the "most literal reading" of

the constitutional text in this case would, however, lead to insurmountable textual difficulties and conflict with both historical evidence and judicial precedent.[4]

Article I, Section 2 of the Constitution provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, § 2, Cl. 1. But, as the district court explained (J.S. App. 21a-23a), the District (unlike each of the 50 States) does not have a "State Legislature." *Congress* exercises exclusive legislative power over the District. See U.S. Const. Art. I, § 8, Cl. 17.[5] Because the House of Representatives is the more numerous branch of the Congress, treating the District of Columbia as a State in this context would result in the circular requirement that voters for Representatives to the House of Representatives from the District have the qualifications to vote

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[4] Appellants also observe (J.S. 14) that "no article or amendment of the Constitution expressly divests or deprives" District residents of the right to representation in Congress. See also J.S. 16-17 (District Clause does not provide for disenfranchisement). That fact is not surprising, however, because the Constitution gives the right to vote for Representatives only to the people of the "several States" (Art. I, § 2, Cl. 1), which (as explained at pp. 11-13, *infra*) cannot sensibly be read to include the District of Columbia. Thus, there was no right of representation to take away. See also pp. 13-14, *infra* (explaining that the Twenty-third Amendment confirms that the District of Columbia is not a State entitled to Representatives in Congress).

[5] For most of its history, the District had no legislative body other than Congress. See J.S. App. 21a & n.19. Although the District currently has a City Council, Congress has retained ultimate legislative authority over the District. See U.S. Const. Art. I, § 8, Cl. 17; District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 601, 87 Stat. 813 (codified at D.C. Code Ann. § 1-206 (1981)).

for Representatives in the House—"a tautology without constitutional content." J.S. App. 23a.[6]

Article I, Section 2 also provides that Representatives shall be apportioned among "the several States *which may be included within this Union.*" U.S. Const. Art. I, § 2, Cl. 3 (emphasis added). The "Union" includes only those States that ratified the Constitution and additional States admitted to the Union pursuant to the express provision of Article IV, Section 3, Clause 1, which governs the admission of new States; the Union does not include the District, which has never been admitted by Congress to the Union as a State. See *Tidewater*, 337 U.S. at 588 (plurality opinion of Jackson, J.). "Indeed, the 'Seat of Government' contemplated by the Constitution is subsequently described in Article I as a 'District,' in contrast to the 'particular States' whose cessions of territory were expected to create it." J.S. App. 24a (quoting U.S. Const. Art. I, § 8, Cl. 17). And Article I, Section 2 specifically identified the original 13 entities that were considered States at the time the Constitution was adopted and assigned

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[6] As the district court also explained (J.S. App. 26a-27a), appellants' position leads to similar incongruities with respect to the constitutional provisions governing selection of Senators. Under the original text of the Constitution, each State's legislature chose the State's Senators. See U.S. Const. Art. I, § 3, Cl. 1. As we have already noted, however, Congress is the legislature specified by the Constitution for the District. Thus, applying the original constitutional provisions governing selection of Senators to the District would have meant that Congress would itself have chosen the District's Senators. J.S. App. 26a. Under the Seventeenth Amendment, the provisions governing the selection of Senators essentially parallel those concerning Representatives. See *id.* at 27a. Appellants' theory therefore poses problems under the current Senate selection provisions similar to the problems we have discussed above. See *ibid.*; pp. 11-12, *supra*.

each an initial apportionment of Representatives until an "actual Enumeration" of the "respective Numbers" of each State was performed. That provision does not include the District comprising the Seat of Government in either the initial apportionment of Representatives or subsequent apportionments to be made following each decennial census. See U.S. Const. Art. I, § 2, Cl. 3; J.S. App. 24a & n.23.

Significantly, moreover, the Fourteenth Amendment reiterates the command in Article I, Section 2 that "Representatives shall be apportioned among the several States." U.S. Const. Amend. XIV, § 2. By the time that Amendment was ratified in 1868, the practice of not including the District of Columbia in the apportionment of Representatives under the original text of the Constitution was well established. The readoption of that text in the Fourteenth Amendment may properly be regarded as a ratification of that practice and of the constitutional interpretation—that the District of Columbia is not a State (or part of a State) entitled to an apportionment of Representatives —on which it rests. See *District of Columbia* v. *Carter*, 409 U.S. 418, 424 (1973) ("the District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment").

Finally, the text and purposes of the Twenty-third Amendment confirm the correctness of the district court's analysis. Under the Amendment, "[t]he District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct" the number of presidential electors to which it "would be entitled if it were a State." U.S. Const. Amend. XXIII, § 1. The use of the subjunctive in the text makes it clear that the District of Columbia is *not* a State for these purposes. Thus, even if there

were some doubt on the matter under the Constitution as originally adopted, the Twenty-third Amendment establishes in the text of the Constitution itself that the District is not to be regarded as a State or part of a State for the purpose of political representation in the National Government.

The Twenty-third Amendment is of even more direct relevance to this case, however, because the Constitution ties the apportionment of Presidential Electors to representation in Congress. Article II, Section 1, Clause 2 of the Constitution provides that "[e]ach State shall appoint * * * a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. Art. II, § 1, Cl. 2. The situation that was addressed by the Twenty-third Amendment—that, under the Constitution as it then existed, the District of Columbia did not appoint any Presidential Electors—thus necessarily rested on the premise that the District of Columbia is not a "State" that is "entitled" to any Senators or Representatives in Congress. Indeed, in considering this Amendment, Congress specifically recognized that "the District is not a State or a part of a State," H.R. Rep. No. 1698, 86th Cong., 2d Sess. 2 (1960), and that "[t]he proposed amendment * * * would not authorize the District to have representation in the Senate or in the House of Representatives," *id.* at 3.

2. As the district court recognized (J.S. App. 27a-34a), historical evidence further supports the conclusion that the District was not intended to be a State for purposes of apportionment and voting under Article I. At the New York ratifying convention, Thomas Tredwell stated that "[t]he plan of the *federal city*, sir, departs from every principle of freedom * * *

subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 402 (Jonathan Elliot ed., 2d ed. 1888), reprinted in 3 *The Founders' Constitution* 225 (Philip B. Kurland & Ralph Lerner eds., 1987). At that same convention, Alexander Hamilton proposed that the Constitution be amended to provide that when the District's population reached an unspecified number, "[p]rovision shall be made by Congress for having District representation in that Body." 5 *The Papers of Alexander Hamilton* 189-190 (Harold C. Syrett & Jacob E. Cooke eds., 1962). His proposal was not adopted. See J.S. App. 30a.

Moreover, as the district court noted (J.S. App. 30a-33a), the inhabitants of the area that would become the District and the Members of Congress who considered the Organic Act of 1801, ch. 15, 2 Stat. 103, by which Congress assumed exclusive jurisdiction over the District, understood that District residents would not have the right to vote for Representatives or Senators. See, *e.g.*, 10 Annals of Cong. 992 (1801) (remarks of Rep. Smilie); *id.* at 996 (remarks of Rep. Bird); *Enquiries into the Necessity or Expediency of Assuming Exclusive Legislation over the District of Columbia* 15 (1800); Augustus Woodward, *Considerations on the Territory of Columbia* 5-6 (1801). They recognized that District residents could obtain congressional representation only by constitutional amendment, 10 Annals of Cong. 998-999 (1801) (remarks of Rep. Dennis); Woodward, *supra*, at 15, or by retroceding the District to the States (Maryland and Virginia) that had ceded it to the federal

government, 12 Annals of Cong. 487 (1803) (remarks of Rep. Smilie).[7]

As the district court recognized, of perhaps even greater significance is the absence of any evidence of a contrary understanding:

> No political leaders, for example, assured the residents that they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record.

J.S. App. 34a.[8]

Appellants suggest (J.S. 18) that the fact that the residents of the area that became the District continued

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[7] Eventually, that part of the District that had previously been part of Virginia was retroceded, see An Act to retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35, and its residents became citizens of Virginia, indisputably one of the "several States."

[8] The historical evidence discussed in the text above refutes appellants' suggestion that the Constitution's failure to provide congressional representation for District residents was an "accident" (J.S. 10) or oversight that occurred because the site of the District had not been selected at the time the Constitution was adopted (J.S. 16) and because the District's population was small at the time the cession took effect (J.S. 18-19).

to vote in congressional elections in Maryland and Virginia after the District's creation (but before Congress assumed jurisdiction over it) supports their claim that today's District residents have a right to congressional representation. As the district court explained (J.S. App. 44a-47a), however, the voting history actually supports the contrary conclusion.

Maryland and Virginia authorized the cession of the land for the District in 1788. See J.S. App. 42a. Congress accepted the cession in 1790 in an Act that provided for the "seat of the government of the United States" to "be transferred to the district" on the first Monday in December of 1800. An Act for establishing the temporary and permanent seat of the Government of the United States, ch. 28, § 6, 1 Stat. 130. In that Act, Congress expressly provided that "the operation of the laws of" Maryland and Virginia in the ceded land "shall not be affected by this acceptance" of the cession "until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." § 1, 1 Stat. 130. Consistent with that proviso, residents of the land included in the District continued to vote as citizens of Maryland and Virginia in congressional elections as late as 1800. See J.S. App. 44a-47a.

Indeed, it was not until February 27, 1801, that Congress passed the Organic Act, ch. 15, 2 Stat. 103, which provided for the government and the administration of justice in the District of Columbia. After that time, "the laws of [Maryland and Virginia] ceased having force in the District," and "the states ceased treating District citizens as state citizens eligible to vote in their elections." J.S. App. 44a. Since that time, District residents have not voted in congressional elections. See *id.* at 44a, 89a.

Thus, residents of the area that became the District of Columbia voted in congressional elections in Maryland and Virginia between 1790 and 1800 because they were still citizens of those States subject to their laws during that time. Once they became citizens of the District rather than of the ceding States, they ceased to vote for Representatives in Congress, confirming the general understanding that residents of the District do not have that right.[9]

3. The decision of the district court is supported not only by the constitutional text and history, but also by a

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[9] The voting history is also fatal to appellants' alternative contention (J.S. 20) that they should "be deemed to retain a residual citizenship in Maryland" for purposes of voting in congressional elections. Consistent with the history, the Maryland statute ratifying the cession of the land for the District to the United States ceded "full and absolute right and exclusive jurisdiction * * * of persons residing or to reside thereon." 1791 Md. Acts ch. 45, § 2; see J.S. App. 48a. And, in accordance with both the history and the cession statute, courts have rejected all prior attempts to secure for District residents the right to vote in Maryland elections. *Howard* v. *State Admin. Bd. of Election Laws*, 976 F. Supp. 350 (D. Md. 1996) (plaintiff, a resident of the District and former resident of Maryland, has no right to participate in congressional elections in Maryland), aff'd, 122 F.3d 1061 (4th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); *Albaugh* v. *Tawes*, 233 F. Supp. 576 (D. Md.) (three-judge court) (per curiam) (District residents have no right to vote in Maryland elections generally, and, specifically, in the election of United States Senators for Maryland), aff'd, 379 U.S. 27 (1964) (per curiam). See also *Reily* v. *Lamar*, 6 U.S. (2 Cranch) 344, 356-357 (1805) (Marshall, C.J.) ("[b]y the separation of the district of Columbia from the state of Maryland, [District residents] ceased to be * * * citizen[s] of that state, [their] residence being in the [District of Columbia]"); *Hobson* v. *Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966) ("the effect of cession upon individuals [residing in the District] was to terminate their state citizenship and the jurisdiction of the state governments over them").

uniform body of judicial precedent. As early as 1805, Chief Justice Marshall concluded that the word "state" as used in Article I was intended to encompass only "a member of the union" and therefore did not encompass the District of Columbia. *Hepburn & Dundas* v. *Ellzey*, 6 U.S. (2 Cranch) 445, 452-453 (1805). See also *Palmore* v. *United States*, 411 U.S. 389, 395 (1973) (citing *Hepburn & Dundas* in support of the proposition that "[t]he District of Columbia is constitutionally distinct from the States"). In *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317 (1820), Chief Justice Marshall (for a unanimous Court) held that Congress has the power (either under its general taxing authority or its power to legislate for the District) to lay a direct tax on the District despite the residents' "want of a representative in Congress." *Id.* at 325. In the course of the opinion, the Court concluded that Article I, Section 2, Clause 3, which addresses both the apportionment of direct taxes and Representatives, "is expressly confined to the States" and does not extend to the District. *Id.* at 323. Similarly, in *Heald* v. *District of Columbia*, 259 U.S. 114, 124 (1922), the Court rejected a claim that a federal tax on the intangible property of persons residing or engaged in business in the District was unconstitutional "because it subjects the residents of the District to taxation without representation." The Court recognized that "[r]esidents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." *Ibid.* Nonetheless, the Court concluded that "[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Ibid.*

Moreover, in *Hepburn* and later cases, this Court has recognized that the term "State" as used in a variety of

constitutional provisions does not encompass the District of Columbia. *Hepburn*, 6 U.S. (2 Cranch) at 453 (the term "State" as used in the diversity jurisdiction clause of Article III does not encompass the District); *Carter*, 409 U.S. at 424 ("the District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment"); *Tidewater*, 337 U.S. at 588 (plurality opinion of Jackson, J.) (reaffirming that the District is not a "State" for purposes of Article III); *id.* at 626 (Vinson, C.J., dissenting) (same); *id.* at 653 (Frankfurter, J., dissenting) (same). See also *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 278 n.1 (1991) (White, J., dissenting). Indeed, we are aware of no decision holding that the District is a "State" within the meaning of Article I.[10]

The cases on which appellants rely (J.S. 15-16) do not support the conclusion that the District is a "State" for purposes of Article I, Section 2. In *Carter*, the Court held that the District is not a "State or Territory" for purposes of 42 U.S.C. 1983. 409 U.S. at 419. The Court reasoned that Section 1983 was intended to effectuate the Fourteenth Amendment, and that the Fourteenth Amendment applies only to "States," not to the District. See 409 U.S. at 423-424. Although *Carter* con-

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[10] Appellants contend (J.S. 10, 11, 14, 28) that plenary review is warranted because the district court considered itself bound by the precedents cited above and in note 9, *supra*. As described at pp. 5-7, *supra*, however, the district court did not merely invoke those precedents; it carefully considered the constitutional text and history and determined that it would have reached the same conclusion as an independent matter. See J.S. App. 19a-34a, 42a-56a. At the very least, the district court's thorough analysis establishes that there is no basis for this Court to grant plenary review to reexamine any of the controlling precedents.

cerned Section 1983, which was enacted to enforce Section 1 of the Fourteenth Amendment, the Court's interpretation of the term "State" in the Fourteenth Amendment to exclude the District of Columbia presumably also includes Section 2 of the Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective Numbers." U.S. Const. Amend. XIV, § 2.

Appellants' reliance on *Tidewater* is similarly misplaced. The Court in that case upheld a federal statute that conferred jurisdiction on the federal district courts over civil actions between citizens of the District and citizens of a State. But Justice Jackson based his plurality opinion on Congress's exclusive legislative power over the District and the Necessary and Proper Clause. See 337 U.S. at 588-604. Seven Justices reaffirmed Chief Justice Marshall's conclusion that the District is not a "State" for purposes of Article III. *Id.* at 588 (plurality opinion of Jackson, J.); *id.* at 626 (Vinson, C.J., dissenting); *id.* at 653-654 (Frankfurter, J., dissenting). Only Justices Rutledge and Murphy would have overruled prior precedent and held that the District is a "State" for purposes of the Diversity Clause of Article III. *Id.* at 625-626 (Rutledge, J., concurring). And even those two Justices appeared to distinguish between the Diversity Clause and "the purely political clauses," such as Article I, Section 2. J.S. App. 37a (quoting *Tidewater*, 337 U.S. at 619-623 (Rutledge, J., concurring)).

Appellants' reliance on cases applying the Sixth Amendment and the Full Faith and Credit Clause to judicial proceedings in the District is also misplaced. As explained above, see pp. 11-20, *supra*, treating the District as a State for purposes of congressional representation would create insurmountable textual difficul-

ties and would conflict with history and precedent. That is not true with respect to the results reached in the Sixth Amendment and Full Faith and Credit Clause cases.[11]

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[11] Moreover, in none of the cases cited by appellants did the Court expressly state that the word "State" in either the Sixth Amendment or the Full Faith and Credit Clause encompasses the District. Indeed, the Court has explained that the obligation of state courts to accord full faith and credit to the judgments of the courts of the District of Columbia is based on Congress's exercise of its exclusive legislative authority over the District under Article I, not the Full, Faith and Credit Clause of Article IV. *Embry* v. *Palmer*, 107 U.S. 3, 9-10 (1883). See also *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481, 483 (1813) (noting that courts of the District were required to give full faith and credit to the judicial records and proceedings of other courts by virtue of a federal statute that applied by its terms to "every Court within the United States"); 28 U.S.C. 1738. The Court in *Loughran* v. *Loughran*, 292 U.S. 216, 228 (1934), later observed that "courts of the District are bound, equally with courts of the States, to observe the command of the full faith and credit clause, wherever applicable." But the Court made no reference to *Embry*, and placed sole reliance on a case that did not involve the courts of the District of Columbia. See 292 U.S. at 228 (citing *Bradford Elec. Light Co.* v. *Clapper*, 286 U.S. 145, 155 (1932)).

With respect to the right to trial by jury, the Court's decision in *Callan* v. *Wilson*, 127 U.S. 540, 550 (1888), that District residents possess that right rested on the jury trial guaranty of Article III, Section 2, Clause 3, which provides for trial by jury in crimes "not committed within any State." U.S. Const. Art. III, § 2, Cl. 3. The Court rejected the argument that the Sixth Amendment was intended to supplant Article III and limit the jury trial right to the residents of the States. 127 U.S. at 549-550. The Court held instead that Article III guarantees a jury trial "according to the settled rules of common law" and the Sixth Amendment "is to be taken as a declaration of what those rules were." *Id.* at 549. Likewise, both *District of Columbia* v. *Clawans*, 300 U.S. 617, 624 (1937), and *District of Columbia* v. *Colts*, 282 U.S. 63, 72 (1930), cite the jury trial guaranty of Article III.

4. Appellants contend (J.S. 11-14) that plenary review is warranted because the decision below conflicts with this Court's cases reviewing redistricting decisions of state legislatures. There is no conflict. The "one person, one vote" principle that governs the redistricting cases (see *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964)) has no application here. Under the plain terms of the Constitution, District residents are not afforded representation in Congress. As the district court explained (J.S. App. 60a-62a), the principle of "one person, one vote" has never been held to override the representation scheme established by the Constitution itself. Applying the one person, one vote principle in that manner would destroy the fundamental compromise that made the adoption of the Constitution possible. Indeed, the Senate and the Electoral College do not comport with the "one person, one vote" principle, but that does not render them unconstitutional. See *Reynolds*, 377 U.S. at 574-575 (rejecting analogy to constitutional compromise that resulted in establishment of United States Senate in invalidating state legislative apportionment plan that allotted one state senate seat to each county); *Gray* v. *Sanders*, 372 U.S. 368, 378 (1963) (rejecting analogy to Electoral College in invalidating system for counting votes in state primary election that resulted in similar numerical inequalities).

Even with respect to the apportionment of Representatives in the House of Representatives, the federal body that was intended to be the most representative of individual citizens, the one person, one vote rule is subject to significant constitutional exceptions. As this Court has explained, "the Constitution makes it impossible to achieve population equality among inter-

state districts" by providing that "[t]he number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *Wisconsin* v. *City of New York*, 517 U.S. 1, 17 (1996) (quoting *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 447-448 (1992)). Thus, the Court has already held that significant deviations from the one person, one vote principle are permitted when those deviations result from application of the Constitution itself. Compare *Montana*, 503 U.S. at 462 n.40 (noting that applicable constitutional constraints result in Montana congressional district(s) deviating from the size of districts in other States by over 40%) with *Karcher* v. *Daggett*, 462 U.S. 725 (1983) (applying one person, one vote principle to invalidate congressional districts in New Jersey because a 1% difference in population was too great).

5. Appellants' other claims also lack merit. Appellants contend (J.S. 21-23) that residents of the District of Columbia are denied the equal protection of the laws because they lack the right to vote in congressional elections while the residents of the States possess that right. As the district court explained, however, that difference in treatment is "one drawn by the Constitution itself." J.S. App. 60a. The right to vote in congressional elections is delineated by Article I, Section 2. See *Wesberry*, 376 U.S. at 17 (Article I, Section 2 "gives persons qualified to vote a constitutional right to vote and to have their votes counted."); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution."). And, as discussed above, Article I, Section 2 gives voting rights to the people of the 50 States but does not confer voting rights on residents of

the District of Columbia. That distinction, because it is made by the Constitution itself, cannot constitute a denial of the equal protection of the laws.[12]

Appellants further contend (J.S. 23-24) that equal protection principles require that residents of the District of Columbia be treated the same as residents of federal enclaves. But District residents are not situated similarly to residents of federal enclaves. Federal enclaves are located entirely within States, and the residents of an enclave are properly considered state residents. See *Evans* v. *Cornman*, 398 U.S. 419, 421 (1970). Enclaves are temporary in nature; when the areas are no longer needed for federal purposes, control over the land generally is returned to the State. See *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564 & n.11 (1946); *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 542 (1885). By contrast, the District is the "permanent" seat of the federal government, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 104 (1953), "as lasting as the States from which it was carved or the union whose permanent capital it became." *O'Donoghue* v. *United States*, 289 U.S. 516, 538 (1933); see § 1, 1 Stat. 130 (accepting the District "for the permanent seat of the government of the United States"). Indeed, the text of the Constitution itself indicates that an enclave remains part of the State in which it is located while the District is ceded to the federal

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[12] Appellants' substantive due process claim (see J.S. 24-25) and their claim based on the Privileges or Immunities Clause of the Fourteenth Amendment (see J.S. 26-28) fail for similar reasons. Because the Constitution itself does not grant District residents the right to vote in congressional elections, the failure to accord District residents that right is neither a deprivation of liberty without due process of law (see J.S. App. 68a) nor a denial of a privilege of national citizenship (see *id.* at 65a-66a).

government. See U.S. Const. Art. I, § 8, Cl. 17 (referring to the "State in which [an enclave] shall be" but to the formation of the District by "Cession of particular States").

Finally, appellants' procedural due process claim (J.S. 25-26) similarly lacks merit. Contrary to appellants' suggestion (J.S. 25), the Constitution specifically empowers Congress to enact legislation affecting residents of areas that lack congressional representation. The Constitution vests Congress with exclusive legislative authority over both the District and the Territories. See U.S. Const. Art. I, § 8, Cl. 17; *id.* Art. IV, § 3, Cl. 2. The procedural component of the Due Process Clause does not require that citizens of the District of Columbia and the Territories be permitted to vote in congressional elections before Congress can exercise the plenary authority that the Constitution grants it over those areas.[13]

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[13] In their jurisdictional statement to this Court, appellants do not press the claim under the Guarantee Clause of Article IV, Section 4, that they raised in the district court. In any event, the district court correctly rejected that claim, which is not justiciable and, if justiciable, lacks merit. See J.S. App. 69a-70a (rejecting claim on the merits); *Baker* v. *Carr*, 369 U.S. 186, 218-227 (1962) (explaining why most claims under the Guarantee Clause are not justiciable).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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